

**ARTICLE IX. SMOKING\***

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**\*Editor's note:** Ord. No. 2002-800, § 1, adopted August 28, 2002, amended Article IX, §§ 21-236--21-246 in their entirety. Formerly, said article pertained to smoking in public places and derived from Ord. No. 86-1311, § 2, adopted July 30, 1986.

**Cross references:** Air pollution, § 21-146 et seq.; no smoking signs at oil and gas wells, § 31-66; smoking by suburban bus drivers, § 46-147.

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**Sec. 21-236. Definitions.**

As used in this article, the following words and terms shall have the meanings ascribed to them in this section, unless the context of their usage clearly indicates another meaning:

*Bar.* A lounge bar or restaurant bar.

*Concourse.* A concourse is a public passageway, other than a lobby, which is adjacent to seating areas in theaters, arenas, stadia and concert halls.

*Educational facility.* Any day care center, nursery school, elementary school, middle school, junior high school, senior high school, vocational school, special education center, college or university.

*Employee.* Any person other than a domestic household servant who is employed in consideration of direct or indirect monetary wages, commissions or profits and any contract employee.

*Employer.* Any person who employs the services of one or more employees.

*Enclosed areas.* All space between a floor and ceiling that is enclosed on all sides by smoke-impermeable walls or windows (exclusive of door ways) that extend from that floor to the ceiling. An enclosed area may be a portion of a larger enclosed area.

*Exception area.* An area in which smoking is permitted pursuant to section 21-237.

*Large multi-tenant building.* A multi-tenant building with 20,000 square feet or more of useable floor space that has a common heating, ventilating, and air conditioning system in which 50 percent or more of the gross useable floor space is devoted to other than residential, restaurant, hotel/motel, and retail establishment uses. The exterior area within 25 feet of any entrance or exit door or wheelchair ramp serving the door, if any, shall also be included, to the extent it is within the building owner's control and is not being used as a restaurant outdoor seating area.

*Lounge bar.* All areas of any establishment having 50 or more percent of its gross sales from sale of alcoholic beverages for on-premises consumption.

*Multi-tenant.* Any building that has two or more separate occupancies, such as a building owner and one or more tenant occupancies, or if the building owner has no occupancy in the building, then two or more tenant occupancies. For this purpose, an occupancy shall not include a transient occupancy of ten days or less.

*Private function.* Any function for which all of the following conditions are met:

- (1) The function is a specific event for which an entire room or hall has been

reserved.

(2) The function is limited in attendance to people who have been specifically designated and their guests.

(3) Seating arrangements for the function, if any, are under the control of the sponsor of the function and not of the person otherwise responsible for the public place.

*Public ground transportation facility.* Any facility used in connection with public ground transportation into which the public is provided access.

*Public place.* An enclosed area or any portion thereof to which at any time the public is admitted by general invitation or is otherwise given generally unrestricted access, including but not limited to an enclosed area, which, at any time is being utilized in whole or in part for any of the following purposes:

- (1) Commercial establishments, including but not limited to retail establishments and restaurants;
- (2) A vehicle of public ground transportation, other than limousines for hire, including but not limited to trains, buses, taxicabs and ferries;
- (3) Covered or enclosed public ground transportation facilities;
- (4) Elevators;
- (5) Libraries, educational facilities, museums, auditoriums, art galleries and meeting rooms;
- (6) Hotels and motels;
- (7) Health care facilities, including but not limited to laboratories associated with the rendition of health-care treatment, hospitals, nursing homes, and doctors' and dentists' offices;
- (8) Places of entertainment, including but not limited to gymnasiums, theaters, concert halls, and arenas;
- (9) Restrooms;
- (10) Airports;
- (11) Convention centers;
- (12) Governmental facilities; and
- (13) Retail establishment malls.

The imposition of an entry fee, use charge, membership requirement or other condition of entry to an enclosed area shall not prevent its constituting a public place, provided that admission is granted on a uniform basis to persons who meet the established criteria for use or admission, and further provided that no private club or membership organization that receives no public funds shall be considered a public place for purposes of this article.

In addition to the enclosed area described above, the term public place shall include any associated exterior area, whether enclosed or not, that is within 25 feet of any entrance or exit door or wheelchair ramp serving the door, if any, that provides public ingress or egress to the public place, to the extent that the area is within the control of the person who controls the public place and is not being used as a restaurant outdoor seating area.

*Restaurant.* Any coffee shop, cafeteria, luncheonette, sandwich stand, soda fountain,

private and public school cafeteria or eating establishment, and any other eating establishment, organization, club, including veterans' club, boardinghouse, or guesthouse, that gives or offers for sale food to the general public or employees, including kitchens in which food is prepared on the premises for serving elsewhere, such as catering facilities, except that the term *restaurant* shall not be construed to include any portion of the establishment that constitutes a *restaurant bar*. A lounge bar shall not constitute a restaurant for any purpose.

*Restaurant bar*. One contiguous area of a restaurant that is primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which food service, if any, is only incidental to the consumption of such beverages.

*Restaurant outdoor seating area*. Any patio, sidewalk cafe, or similar unenclosed area in which a contiguously situated restaurant provides outdoor food service to its patrons.

*Retail establishment*. Any enclosed area in any portion of which goods or services of any nature are sold or offered for sale directly to consumers including, but not limited to grocery stores, convenience stores, dry goods stores, banks, department stores and specialty shops.

*Retail establishment mall*. An enclosed area that connects customer entrances to two or more retail establishments and is used for customer pedestrian traffic, regardless of whether the area is also used for other purposes. The term *retail establishment mall* does not include separate enclosed areas that may be appended thereto. Separate enclosed areas that are appended to a retail establishment mall shall be subject to separate regulation hereunder, as applicable.

*Sporting event*. An event wherein an individual or team of individuals participates in an athletic endeavor that requires physical exertion, including but not limited to the following activities: baseball, football, basketball, hockey, soccer, tennis, wrestling, boxing, swimming or other water sports, volleyball, gymnastics, handball, skating (ice and roller), weightlifting, fencing, martial arts related sports, table tennis, rodeo or track and field games.

*Tobacco specialty retail shop*. An enclosed area utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental.

(Ord. No. 02-800, § 1, 8-28-02; Ord. No. 05-245, § 1, 3-9-05)

## **Sec. 21-237. Smoking in public places and large multi-tenant buildings generally prohibited.**

(a) A person commits an offense if he is knowingly or intentionally in possession of a burning tobacco product or smokes tobacco in any public place or in any large multi-tenant building.

(b) In conformity with this article, a person having ownership, possession or control of a public place or large multi-tenant building may, but is not required to, designate exception areas in which smoking is permitted.

(c) Except as otherwise prohibited by this article, one or more exception areas may be created within a public place or large multi-tenant building; provided, however that:

(1) The following areas may be designated as exception areas in their entirety only:

- a. An enclosed bed space area of a hospital or nursing home used for two or more patients;
- b. A hotel or motel sleeping room rented to guests; and
- c. A taxicab.

(2) Further, the following areas, or portions thereof, may be designated as exception areas:

- a. A restaurant bar;
- b. A lounge bar;
- c. A tobacco specialty retail shop;
- d. A convention center exhibition area;
- e. A lobby, mall (other than a retail establishment mall), reception area or waiting room;
- f. A room or hall being used for private functions;
- g. A room or area that is being used as hospitality suite at a stadium; and
- h. A separately enclosed private individual office or work area or occupancy within a large multi-tenant building;

provided that the uses listed above may not be designated if they are situated within and do not constitute a separate enclosed area from a retail establishment mall.

(3) If the exception area does not constitute the entirety of an enclosed area, it shall be located immediately adjacent to the exhaust system of the enclosed area, if any, or otherwise located and ventilated so that smoke is not drawn into or across any area where smoking is prohibited.

(4) The exception area shall be designated in conformity with the requirements of subsection (f) of this section.

(5) The exception area shall not include the following areas: elevators; restaurants (other than restaurant bars, or rooms or halls used for private functions); restrooms (unless separate facilities are provided for smokers and nonsmokers); retail establishments (other than bars and tobacco specialty shops that are not situated in retail establishment malls); retail establishment malls; spectator seating areas and concourse areas of theaters, arenas, stadia, concert halls and enclosed facilities (other than bars) being used for public performances or for sporting events other than in enclosed stadia having a seating capacity of 30,000 or more persons; public meeting rooms (unless being utilized for a private function); registration desks; copy rooms; or areas where possession of a burning tobacco product or smoking tobacco is prohibited by the Fire Code. In a multilevel enclosed stadium having a seating capacity of 30,000 or more persons, exception areas may be created in hospitality suites and an exception area may be created on the concourse area of only one level, provided that a concourse exception area may only be created if there are one or more bars selling mixed drink alcoholic beverages in the concourse on that level and further provided that a concourse exception area may not extend to within two feet of any spectator seat; except in hospitality suites, no spectator seating may be included in any exception area.

(6) Any area that is designated as an exception area within a large multi-tenant building must be equipped with a ventilation system that provides an air exchange at least once every 15 minutes and exhausts all of the exchanged air through ductwork to the exterior of the building so that it is not drawn into any nonsmoking area of the building. The system shall be designed so that the exception area is at neutral air pressure to any adjacent and occupied nonsmoking area. The air exchange system shall, to the extent required by state law, the Construction Code, and the Fire Code, be designed by a Texas licensed professional engineer. This requirement shall not be construed to preclude air exchange between smoking and non smoking areas through use of automated dampers or similar devices during a life safety emergency situation, where required to conform to emergency pressurization provisions of the Construction Code and the Fire Code.

(d) It is an affirmative defense to the application of the offense stated in subsection (a) above, if the person is in possession of the burning tobacco product or smokes tobacco:

- (1) Exclusively within an exception area designated for smoking tobacco; or
- (2) As a participant in an authorized theatrical performance.

(e) It shall be the duty of every person having ownership, possession or control of any public place or large multi-tenant building to cause extinguishment facilities to be provided and maintained as required in this subsection, and any knowing or intentional failure to maintain compliance with such duty shall constitute an offense. An extinguishment facility shall be provided:

- (1) At each exterior entrance to the public place; and
- (2) In each exception area, if any, provided that an extinguishment facility need be provided only at the entrance to any enclosed area containing more than one exception area, and further provided that extinguishment facilities for elevators shall be placed at each landing and may not be situated within any elevator car.

(f) It shall be the duty of every person having ownership, possession or control of any public place or large multi-tenant building to cause any exception areas and the boundaries thereof to be clearly disclosed to persons within the public place or large multi-tenant building and any knowing or intentional failure to maintain compliance with such duty shall constitute an offense. The information that is required to be provided under this subsection may be furnished in any one or more of the following manners as applicable:

- (1) By conspicuously posting signs in the exception area which clearly delineate the bounds of the exception area and state that smoking is permitted therein.
- (2) If the entirety of the enclosed area has been designated as an exception area, by posting a sign at each entrance thereto, which sign must clearly indicate the bounds of the exception area and state that smoking is permitted therein.
- (3) In a public place that has controlled seating whereby an employee directs patrons to seating or waiting areas, by asking each patron whether he prefers a smoking-permitted or a non-smoking area before directing that patron to a seat in the appropriate area. If the establishment takes advance reservations, the person taking the reservations shall ask whether the patron prefers a smoking-permitted or no-smoking area at the time the reservation is made.

In a public place that is utilizing this method, a sign must be conspicuously posted at each entrance stating "Smoking-Permitted and No-Smoking Areas Available" and a wall chart must be conspicuously posted and available for review near the main entrance clearly designating the smoking-permitted and no-smoking areas.

Any sign that is required to be posted pursuant to this subsection shall be printed in proportional and proportionally spaced letters of a color clearly contrasting with the background upon which they are printed, which letters shall have a height of not less than one inch.

(g) It shall be the duty of every person in control of a public place or large multi-tenant building in which the possession of a burning tobacco product or smoking tobacco is declared an offense by subsection (a) above to request any person known to be in possession of a burning tobacco product or smoking tobacco and who is known not to be in an exception area to extinguish the burning tobacco product. Any knowing or intentional failure to maintain compliance with such duty shall constitute an offense.

(h) In addition to all requirements of article II of chapter 20 of this Code, the health officer shall, in conjunction with the inspection of each proposed establishment as is required to be

conducted prior to the issuance of a food dealer's permit pursuant to section 20-36 of this Code, inspect such proposed establishment for compliance with subsection (f) above, if applicable to such proposed establishment or any portion thereof. No food dealer's permit shall be issued therefor unless the establishment is in compliance with subsection (f) above, if said subsection is applicable to such proposed establishment or any portion thereof.

(Ord. No. 02-800, § 1, 8-28-02; Ord. No. 05-245, § 1, 3-9-05)

#### **Sec. 21-238. Smoking in patients' rooms.**

(a) It shall be unlawful for the person in charge of any hospital or nursing home knowingly or intentionally to permit any patient to be assigned to an enclosed bed space area that has been designated as an exception area if the patient has requested assignment to a nonsmoking area during the course of his admission to the hospital or nursing home.

(b) It shall be unlawful for any person who is not a patient assigned to such enclosed bed space area to be in possession of a burning tobacco product or to smoke tobacco within an enclosed bed space area that has been designated as an exception area.

(Ord. No. 02-800, § 1, 8-28-02)

#### **Sec. 21-239. Employers' policies.**

Each employer shall adopt, implement and maintain a written employee smoking policy for application in places other than public areas. The policy shall accommodate the preference of any nonsmokers to work in a smoke-free area. The provisions of this section shall not be construed to require any employer to allow smoking on any premises. A copy of the policy shall be provided to all current employees within three weeks of the date of the adoption of such policy, and to all future employees at the time of their entry into employment.

(Ord. No. 02-800, § 1, 8-28-02)

#### **Sec. 21-240. Exception areas not required.**

Nothing in this article shall be construed to require any person to establish an exception area in order to accommodate the preference of smokers. Any exception area that is designated must be created and maintained in strict compliance with this article.

(Ord. No. 02-800, § 1, 8-28-02)

#### **Sec. 21-241. Inspections; reports.**

(a) The health officer, upon written complaint, shall inspect exception areas in public places and large multi-tenant buildings within the city to determine whether the exception areas have been designated in conformity with this article.

(b) The health officer, after proper identification, shall be permitted to enter any public place or large multi-tenant building at any reasonable time, for the purpose of making inspections of exception areas to determine compliance with this article. The health officer shall be permitted to examine the applicable records of the establishment to obtain information pertaining to the designation of the exception area. Records required to be maintained for inspection relating to each exception area in a large multi-tenant building shall include a computation of the volume of the exception area and verification by a licensed professional engineer that the system meets

the requirements set forth in this article.

(c) Whenever an inspection is made of a public place or large multi-tenant building, the findings shall be recorded on an inspection report form, and the original of each inspection report shall be provided to the person in charge of the establishment. Another copy of the inspection report shall be filed with the records of the department. An additional copy shall be mailed to the person who filed the complaint at the address specified on the complaint form.

(d) The inspection report form shall set forth the following:

- (1) The specific conditions in the exception area, if any, that are in violation of this article;
- (2) That a hearing will be held before the health officer if written notice of appeal is filed in the office of the director within ten days after the date of the inspection;
- (3) That the appeal may be filed by the person in possession or control of the public place or large multi-tenant building;
- (4) That the appeal must be filed on a form prescribed for that purpose by the director; and
- (5) That the person in possession or control may appear in person and/or be represented by counsel and may present testimony and may cross-examine all witnesses.

If exception areas are found to be in violation within two or more enclosed areas, then a separate inspection report shall be issued for each enclosed area.

(e) The inspection report shall also specify a date certain, not less than ten nor more than 30 days following the date of the inspection by which the exception area must be removed or the conditions of violation specified must be corrected. In establishing the date, the health officer shall take into consideration the nature and extent of the work required, if any, to correct the deficiencies noted. Failure to remove the exception area or to correct the conditions of violations noted by the date specified in the inspection report shall constitute an offense.

(f) Whenever an exception area is removed in order to comply with an inspection report issued under the provisions of this section, it shall not be redesignated until such time as a reinspection determines that conditions responsible for the requirement to remove the exception area no longer exist. The health officer shall make a reinspection within ten days after receipt of a written request therefor.

(g) Any complainant who believes that the inspection report resulting from his complaint is materially incorrect may file a written statement with the director stating the respects in which the report is believed to be incorrect. The director shall review such complaint and inspection report, and if he determines that there is a probability that the inspection report is in error, he shall cause the enclosed area to be reinspected.

(Ord. No. 02-800, § 1, 8-28-02)

#### **Sec. 21-242. Appeals to hearing officer; decisions.**

- (a) If an appeal is timely filed pursuant to section 21-241, a hearing shall be held.
- (b) All hearings shall be held by the health officer who shall be referred to as the hearing officer; however, the director shall not designate any person to perform the duties of hearing officer under this section who has participated in the inspection of such exception area, or has prior knowledge of the allegations or circumstances discovered in such inspection or inspections except that the person designated as hearing officer may, prior to the hearing, receive a copy of the notice given to the person in charge.

(c) All hearings shall be conducted under rules consistent with the nature of the proceedings; provided, however, that the following rules shall apply to such hearings:

(1) The person who filed the appeal (the appellant) and the person or persons who filed the complaint (the complainant(s)) shall each be given written notice of the date, time and place of the hearing. Such notices shall be deposited in the United States mail at least ten days prior to the hearing. The notice shall be mailed to the address specified for notice on the appeal form or complaint form as applicable.

(2) The city and the appellant shall have the right to representation by a licensed attorney though an attorney is not required.

(3) The city and the appellant may present witnesses in their own behalf.

(4) The city and the appellant shall each have the right to cross-examine all witnesses.

(5) Only evidence presented before the hearing officer at such hearing may be considered in rendering the order.

(d) If the appellant fails to appear at the hearing at the time, place and date specified, the city shall present sufficient evidence to establish a prima facie case showing violation of this article which formed the basis of the removal of the exception area.

(e) The hearing officer shall make written findings of fact. If the hearing officer finds that the exception area is, in fact, in violation of this article, he shall order the removal of the exception area. The exception area may not be redesignated until it is found to be in compliance after reinspection under section 21-241(f). A copy of the findings and order of the hearing officer shall be sent by certified mail, return receipt requested, to the person filing the appeal at the address specified for notice in the appeal and filed in the office of the director. If the complainant appeared at the hearing, he shall also be furnished a copy of the order.

(f) The timely filing of an appeal shall stay the operation of the inspection report. It shall be unlawful for any appellant to fail to remove an exception area pursuant to an order of the hearing officer issued under subsection (e), above, by the 14th day following the deposit of the order in the United States mail in the manner provided herein.

(Ord. No. 02-800, § 1, 8-28-02)

### **Sec. 21-243. Appeal to city council.**

(a) Any person aggrieved by a decision of the hearing officer pursuant to section 21-242 may make a written appeal to the city council by filing such appeal in the office of the city secretary within ten days after receipt of written notice containing the findings and order of the hearing officer and the timely filing of the appeal shall serve to stay the operation of such order. The city secretary shall forward the written appeal, together with the complaint form, inspection report, findings, order and other documents or evidence received by the hearing officer, to the city council. Upon receipt thereof, the city council shall set a time and place for hearing such appeal and cause the city secretary to give notice thereof to all parties. Such notices shall be deposited in the United States mail at least ten days prior to the hearing.

(b) A decision of the city council shall be effective as of the date it is issued. Every decision of the city council shall be final. The city secretary shall send written notice of the city council's decision to all parties.

(c) It shall be unlawful for any appellant to fail to remove an exception area pursuant to a decision of the city council by the fourteenth day following the deposit of notice of said decision in the United States mail by the city secretary.

(Ord. No. 02-800, § 1, 8-28-02)



**Sec. 21-244. Rules and regulations.**

The director may promulgate rules and regulations consistent with this article with respect to inspection, hearing and appeal procedures. The director may also promulgate forms that must be utilized for the purpose of filing complaints and appeals hereunder.

(Ord. No. 02-800, § 1, 8-28-02)

**Sec. 21-245. Public education.**

The health officer shall engage in a program to explain and clarify the purposes of this article to citizens affected by it, and to guide owners, operators and managers in their compliance with it.

(Ord. No. 02-800, § 1, 8-28-02)

**Sec. 21-246. Other smoking prohibitions not affected.**

Nothing in this article shall be construed to repeal or excuse compliance with smoking prohibitions imposed by the fire code. The extent that any offense specified in this article also constitutes an offense under the fire code, then the offense shall be punishable pursuant to the fire code.

(Ord. No. 02-800, § 1, 8-28-02)

**Sec. 21-247. Violations; penalty.**

Whenever in this article an act is prohibited or is made or declared to be unlawful or an offense or misdemeanor, or whenever in this article the doing of any thing or act is required or the failure to do any thing or act is prohibited, the violation of the provision shall be and constitute a misdemeanor punishable, upon conviction, by a fine not to exceed \$2,000.00. Each violation shall constitute and be punishable as a separate offense. Prosecution or conviction under this provision is cumulative of and shall never be a bar to any other civil or administrative remedy provided or allowed in this article or by law.

(Ord. No. 05-245, § 3, 3-9-05)